

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES OF THE  
COLVILLE RESERVATION, a  
federally recognized Indian  
tribe; and C. VERNON JOHNSON,

Plaintiffs,

v.

PHIL ANDERSON, Director of  
the Washington department of  
Fish and Wildlife, in his  
official capacity; and BRUCE  
BJORK, Chief of the  
Washington Department of Fish  
and Wildlife Enforcement  
Program, in his official  
capacity,

Defendants.

NO. CV-09-0342-EFS

**ORDER GRANTING AND DENYING IN  
PART DEFENDANTS' MOTION TO  
DISMISS PLAINTIFFS' § 1983  
CLAIMS**

The parties ask the Court to wrestle with an age-old issue: the struggle between two sovereigns asserting their respective rights to protect the safety and interests of those for whom they are responsible. The state of Washington<sup>1</sup> asserts its right to enforce hunting laws

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<sup>1</sup> For ease of reference, the Court hereafter refers to Defendants collectively as the "State" where appropriate. Defendant Phil Anderson is the current Director of the Washington Department of Fish and Wildlife

1 against members of the Colville Indian Tribe ("Tribe"), who are hunting  
2 off the reservation but on lands on which tribal members enjoy "in  
3 common" treaty-hunting rights.<sup>2</sup> Although numerous appellate and district  
4 courts have discussed the interplay between a state's and a tribe's  
5 responsibilities as they relate to wildlife *conservation* to which they  
6 enjoy "in common" rights, no appellate court has focused on this  
7 interplay as it relates to hunting *safety*. The Court herein is tasked  
8 with the responsibility of setting forth a legal standard with which to  
9 assess the State's hunting safety laws, as well as resolving challenging  
10 issues relating to Plaintiffs' 42 U.S.C. § 1983 claims.

### 11 I. Background<sup>3</sup>

12 On November 17, 2007, a Washington Department of Fish and Wildlife  
13 (WDFW) enforcement officer stopped Plaintiff C. Vernon Johnson, who is  
14 an enrolled member of the Tribe,<sup>4</sup> and cited him for possessing a rifle in  
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16 (WDFW) and oversees the enforcement of State hunting laws. Defendant  
17 Bruce Bjork is WDFW's Assistant Director and Chief of WDFW's Enforcement  
18 Program.  
19

20 <sup>2</sup> Hereinafter, the Court simply refers to off reservation "in  
21 common" treaty-hunting right as "in common" hunting right.

22 <sup>3</sup> The facts are largely undisputed. This background is based  
23 primarily on the parties' Joint Statement of Uncontroverted Facts (ECF  
24 No. 52).

25 <sup>4</sup> The Tribe is a federally-recognized Indian tribe composed of  
26 twelve aboriginal tribes that traditionally occupied large parts of the

1 a motor vehicle with a round in the magazine in violation of state law,  
2 RCW 77.15.460(1). Based on this citation, Mr. Johnson was prosecuted in  
3 Stevens County District Court. Mr. Johnson pled guilty to the  
4 misdemeanor charge; the state court imposed a \$100 fine, including court  
5 costs, and a twelve-month deferred sentence. Mr. Johnson did not appeal  
6 his conviction or sentence. His deferred twelve-month sentence expired  
7 with no violations. Not raised during the state criminal proceeding was  
8 whether the State lacked the authority to convict and sentence Mr.  
9 Johnson because the 1891 Agreement between the United States and the  
10 Tribe allows Mr. Johnson to enjoy "in common" hunting rights in the  
11 location he was cited: the north half of the Colville Reservation ("North  
12 Half").<sup>5</sup>

13  
14 interior Columbia River basin.

15 <sup>5</sup> In the 1891 Agreement, the Tribe agreed to public settlement of  
16 certain lands within the North Half. The North Half encompasses  
17 approximately 1.5 million acres, which is mostly undeveloped, sparsely  
18 populated land between the Okanogan and Columbia Rivers. The largest  
19 population centers in the North Half are Tonasket, located on the  
20 Okanogan River, and Republic, in the south central part of the North  
21 Half, each of which has approximately 1,000 residents. The North Half  
22 overlaps with portions of Ferry, Okanogan, and Stevens Counties, which  
23 as a whole, are among the least densely populated counties in the State.  
24 In Okanogan and Stevens Counties, the largest population centers are  
25 outside of the North Half.  
26

1 Article 6 of the 1891 Agreement reserved to the Tribe a perpetual  
2 right to hunt and fish on the North Half:

3 It is stipulated and agreed that the lands to be allotted as  
4 aforesaid to said Indians and the improvements thereon shall  
5 not be subject, within the limitations prescribed by law, to  
6 taxation for any purpose, national, state or municipal; that  
7 said Indians shall enjoy without let or hindrance the right at  
8 all times freely to use water power and water courses belonging  
9 to or connected with the lands to be so allotted, and *that the*  
10 *right to hunt and fish in common with all other persons on*  
11 *lands not allotted to said Indians shall not be taken away or*  
12 *in anywise abridged.*

13 (Emphasis added.) Congress ratified and approved the 1891 Agreement  
14 through a series of statutes enacted between 1892 and 1911.

15 The population and settlement of the State and mobility of  
16 individuals have increased exponentially since the 1891 Agreement.  
17 Today, a substantial portion of North Half lands are publicly owned,  
18 including national forest land, State-owned trust land managed by the  
19 Washington Department of Natural Resources, and two wildlife areas  
20 managed by the WDFW.

21 Both the State and the Tribe exercise their respective sovereign  
22 police powers and have enacted laws aimed at increasing hunter safety.  
23 The Tribe's Business Council is responsible for approving tribal hunting  
24 regulations that are proposed by the Tribe's Fish and Wildlife  
25 Department, which is responsible for the day-to-day management of natural  
26 resources and hunting, and coordinating with other federal, tribal, and  
State regulatory agencies. The Tribe's Parks and Recreation Program has  
primary enforcement responsibility for hunting on the Colville  
Reservation. The Tribe has a court system, including a trial and  
appellate court, to assist with the prosecution and defense of those  
charged with hunting violations.

The State also enacted hunting laws and has agents responsible for enforcing such laws. RCW 77.15.075. WDFW currently has two enforcement officers assigned to the North Half area.

Although the Tribe's<sup>6</sup> and the State's hunting laws are similar, they are not identical:

Tribe	State
-prohibits Tribal members hunting on the North Half from possessing a rifle or shotgun with a shell in the chamber in a motor vehicle, but permits shells in an attached magazine	-prohibits possession of a rifle or shotgun with a shell in either the chamber or an attached magazine in or on a motor vehicle, unless the hunter also possesses a disabled hunter's permit as provided by RCW 77.32.237 and complies with all rules of WDFW concerning hunting by people with disabilities, RCW 77.15.460(1), (4)(b)
-prohibits members from negligently shooting a firearm or a bow and arrow from, across, or along the maintained portion of any public highway in the North Half	-prohibits a person from negligently shooting a firearm from, across, or along the maintained portion of a public highway, RCW 77.15.460(2)
-prohibits hunting under the influence of intoxicating liquor or drugs	-prohibits hunting under the influence of intoxicating liquor or drugs, RCW 77.15.675(1)
-generally prohibits hunting outside of the period between one-half hour before sunrise and one-half hour after sunset except for black bear, cougar, bobcat, raccoon and skunk, which may be hunted at any time, including with the use of an artificial light of no more than 10,000 candlepower	-prohibits hunting for most species outside of the period between one-half hour before sunrise and one-half hour after sunset, WAC 232-12-289  -prohibits a person from hunting big game with the aid of a spotlight or other artificial light, RCW 77.15.450(1). "Big game" includes elk, deer, moose, mountain goat, caribou, mountain

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<sup>6</sup> The chart includes the Tribe's 2009-10 hunting season regulations.

	sheep, pronghorn antelope, cougar, and bear, RCW 77.08.030
-recommends, but does not require, that members hunting on the North Half during the State's modern firearm hunting season for deer or elk wear a minimum of 400 square inches of florescent hunter orange exterior clothing	-requires hunters to wear at least 400 square inches of fluorescent hunter orange clothing when hunting deer or elk during the State's modern firearm season or when hunting certain other species when the same areas are open for modern firearm deer or elk season, WAC 232-12-055
-authorizes only disabled hunters to shoot from within a motor vehicle and places restrictions on such hunting	-prohibits possession of a loaded firearm in or on a motor vehicle, RCW 77.15.460(1), implicitly making shooting from a vehicle unlawful. State law does provide an exception for disabled hunters. RCW 77.15.460(4)(b); WAC 232-12-828(5), (6)

Mr. Johnson and the Tribe bring this lawsuit to obtain equitable relief preventing the State from applying its hunting laws to tribal members exercising their "in common" hunting rights. Thereafter, the State filed a Motion to Dismiss Plaintiffs' § 1983 Claims (ECF No. [26](#)) and the parties filed cross Motions for Partial Summary Judgment Re: Legal Standard (ECF Nos. [16](#) & [29](#)). On June 23, 2010, the Court heard oral argument on the motions.<sup>7</sup> At the hearing, the Court inquired as to the impact of *Heck v. Humphrey* ("Heck"), 512 U.S. 477 (1994), on Mr. Johnson's 42 U.S.C. § 1983 claim; leave was given to file post-hearing briefs on this issue. After reviewing the submitted material and relevant authority and hearing from counsel, the Court is fully informed.

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<sup>7</sup> The Tribe and Mr. Johnson, who was present, were represented by John Arum, Joshua Osborne-Klein, and Timothy Woolsey. Joseph Shorin, III and Matthew Kernutt appeared the State's behalf.

1 As explained below, the Court dismisses the Tribe's § 1983 claim, allows  
2 Mr. Johnson to pursue his § 1983 claim, and sets forth the legal standard  
3 with which to assess the State hunting safety laws.

## 4 **II. Defendants' Motion to Dismiss Plaintiffs' § 1983 Claims**

5 The State seeks dismissal of Plaintiffs' 42 U.S.C. § 1983 claims on  
6 the grounds that 1) the Tribe a) is not a "person" as defined by § 1983  
7 and b) may not maintain a § 1983 action as *parens patriae* for tribal  
8 members, and 2) Mr. Johnson may not bring a § 1983 action based on a  
9 communally-held hunting right. Plaintiffs respond that the Tribe may  
10 bring a *parens patriae* § 1983 action on its members' behalf and that Mr.  
11 Johnson may pursue a § 1983 claim because the State violated his  
12 personally-held federally-recognized hunting right. At the hearing, the  
13 Court raised the issue of whether, even if Mr. Johnson has standing to  
14 bring a § 1983 claim, his claim is barred by *Heck*. As set forth below,  
15 the Court finds, while the Tribe may not pursue a § 1983 action, Mr.  
16 Johnson has standing to bring a § 1983 action and *Heck's* favorable-  
17 termination rule does not apply.

### 18 **A. Standard**

19 A lawsuit is to be dismissed under Federal Rule of Civil Procedure  
20 12(b)(6) if it fails to state a claim for relief that is plausible on its  
21 face. Fed. R. Civ. P. 12(b)(6) (2010). "[A] complaint [that] pleads  
22 facts that are 'merely consistent with' a defendant's liability" fails  
23 to satisfy the "plausible" standard. *Ashcroft v. Iqbal*, 129 S. Ct. 1937,  
24 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557  
25 (2007)). In conducting its analysis, a court need not accept a  
26 plaintiff's legal conclusions as true, but must accept the alleged facts

1 as true and construe all inferences from them in the light most favorable  
2 to the plaintiff. *Id.* at 1949-50.

3 **B. Mr. Johnson**

4 Mr. Johnson seeks injunctive relief<sup>8</sup> under 42 U.S.C. § 1983<sup>9</sup>  
5 preventing the State from enforcing State hunting safety laws against him  
6 on the grounds that the State's citation and prosecution of these hunting  
7 offenses violate his "in common" hunting rights. To maintain this § 1983  
8 claim, Mr. Johnson must bypass two hurdles. First, he must establish  
9 that he has standing to bring a § 1983 claim. Second, he must show that  
10 *Heck's* favorable-termination rule does not apply to his § 1983 claim.

11 1. Standing

12 Relying upon *Skokomish Indian Tribe v. United States* ("Skokomish"),  
13 410 F.3d 506 (9th Cir. 2005), the State argues that Mr. Johnson does not  
14 have standing to assert a § 1983 action for an alleged deprivation of the  
15 "in common" hunting right because a tribal member may not seek  
16 vindication under § 1983 for the deprivation of a *communal* tribal right.

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18 <sup>8</sup> Mr. Johnson and the Tribe also seek reasonable attorneys' fees  
19 and costs pursuant to 42 U.S.C. § 1988.

21 <sup>9</sup> Section 1983 provides:

22 Every person who, under color of any statute, ordinance,  
23 regulation, custom, or usage, of any State or Territory or the  
24 District of Columbia, subjects, or causes to be subjected, any  
25 citizen of the United States or other person within the  
26 jurisdiction thereof to the deprivation of any rights,  
privileges, or immunities secured by the Constitution and laws,  
shall be liable to the party injured in an action at law, suit  
in equity, or other property proceeding for redress, . . . .

42 U.S.C. § 1983.



1 Mr. Johnson responds that *Skokomish* is not on point and instead relies  
2 on *Romero v. Kitsap County*, 931 F.2d 624, 626 (9th Cir. 1991).

3 In *Skokomish*, both the tribe and individual tribal members attempted  
4 to bring a § 1983 action against a city and a public utility for their  
5 actions in connection with the installation of dams, reservoirs, and  
6 other water projects, which flooded the reservation and caused  
7 substantial damage. In pertinent part, the Ninth Circuit stated:

8 The Tribe's treaty-based rights do not give rise to individual  
9 actions cognizable under section 1983. As we stated in *Settler*  
10 *v. Lameer*, 507 F.2d 231, 237 (9th Cir. 1974), with regard to  
11 fishing rights similar to those that the Tribe's members assert  
12 here, "the fishing rights reserved in [the treaty] are communal  
13 rights of the Tribe, even though the individual members benefit  
14 from those rights." See also *Whitefoot v. United States*, 155  
15 Ct.Cl. 127, 293 F.2d 658, 663 (1961) (noting that "interests  
16 in . . . fisheries are communal, subject to tribal  
17 regulation"). Because the Tribe's members seek to vindicate  
18 communal, rather than individual rights, they do not have  
19 cognizable section 1983 claims against the City or TPU.

20 *Id.* at 515-16 (nn.7-8 omitted). The language utilized by the Ninth  
21 Circuit in the body of its opinion is broad and appears to stand for the  
22 proposition asserted by the State: Mr. Johnson may not pursue his § 1983  
23 action for violation of a treaty right. However, this broad language is  
24 limited by footnote eight, which states:

25 In *Romero v. Kitsap County*, 931 F.2d 624 (9th Cir. 1991), we  
26 acknowledged that section 1983 claims for deprivations of  
27 treaty rights may be cognizable "under specified  
28 circumstances," *id.* at 627 n.5 (citing *Hoopa Valley [Tribe v.*  
29 *Nevins]*, 881 F.2d [657,] 661-63 [9th Cir. 1989]), but we  
30 offered no additional insight into the issue. *Romero* itself  
31 was brought by, among others, individual tribal members who  
32 were arrested for gathering shellfish in areas they claimed  
33 were treaty-protected. The individuals brought suit under  
34 section 1983 against the officers who arrested them. This was  
35 a traditional section 1983 suit for unlawful arrest, clearly  
36 distinguishable from our case.

37 *Id.* at 516 n.8.

1 Here, state action was taken directly against Mr. Johnson: he was  
2 arrested and convicted of a state offense. Accordingly, his § 1983 claim  
3 is akin to that in *Romero* and unlike the generic state action in  
4 *Skokomish*. Therefore, the Court finds Mr. Johnson has standing to bring  
5 his § 1983 claim based on the alleged unlawful state citation and  
6 conviction in violation of the federally-secured treaty hunting right.<sup>10</sup>  
7 Defendants' motion is **denied in part**.

8 2. Heck's Favorable-Termination Rule

9 Because Mr. Johnson has standing to pursue the § 1983 claim, the  
10 Court must determine whether Mr. Johnson, who received a deferred twelve-  
11 month sentence for possessing a rifle in a motor vehicle with a round in  
12 the magazine, is required to satisfy *Heck's* favorable-termination rule  
13 in order to obtain the requested equitable relief. As explained below,  
14 the Court determines the favorable-termination rule does not apply.

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16 <sup>10</sup> This ruling is also consistent with criminal law, wherein a  
17 criminal defendant may seek dismissal of the indictment on the grounds  
18 that the alleged offense violates a federally-secured treaty hunting  
19 and/or fishing right. See *United States v. Dion*, 476 U.S. 734, 735-36  
20 (1986) (addressing defendant's argument that federal statutes violated  
21 a treaty-hunting right); *United States v. Williams*, 898 F.2d 727 (9th  
22 Cir. 1990) (allowing defendant to challenge state conviction on the  
23 grounds that it violated a treaty-hunting right). See also *United States*  
24 *v. Fox*, 573 F.3d 1050 (10th Cir. 2009) (rejecting government's argument  
25 that hunting right was not a right enjoyed by the tribal member but  
26 rather a treaty communal right).

1       The purpose of the favorable-termination rule is to harmonize the  
2 two main federal avenues of relief from state action: a petition for  
3 habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights  
4 Act, 42 U.S.C. § 1983. See *Wilkinson v. Dotson*, 544 U.S. 74, 77-78  
5 (2005). Habeas corpus is the province for challenges to the validity of  
6 any confinement or to particulars affecting its duration. *Preiser v.*  
7 *Rodriguez*, 411 U.S. 475, 500 (1973). A § 1983 action requests relief  
8 from state action that deprived one of a federal right. The favorable-  
9 termination rule was developed to ensure that an individual who is, or  
10 was, in custody pursues the stringent time requirements for habeas relief  
11 before filing a § 1983 action, *Huftile v. Miccio-Foncesco*, 410 F.3d 1136,  
12 1137 (9th Cir. 2005). The favorable-termination rule, as developed by  
13 subsequent *Heck* cases, requires an individual who is, or was, in custody  
14 and is seeking relief that necessarily implies the invalidity of his  
15 conviction or sentence to establish that the conviction or sentence was  
16 already invalidated. *Id.* at 1139-40.

17       Here, Mr. Johnson was never "in custody" in connection with his  
18 misdemeanor conviction for unlawfully possessing a firearm in a vehicle.  
19 Mr. Johnson paid the imposed \$100 fine, and it is undisputed that the  
20 deferred twelve-month sentence,<sup>11</sup> which required him to not commit further

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22       <sup>11</sup> A deferred sentence was allowed for this misdemeanor offense  
23 pursuant to RCW 3.66.067. During the pendency of the deferral, Mr.  
24 Johnson's guilty plea could have been withdrawn and the charges dropped.  
25 However, there is no evidence that this occurred. Accordingly, Mr.  
26 Johnson's conviction stands.

1 hunting violations and to appear for a review hearing, has expired. Mr.  
2 Johnson's freedom was never significantly confined or restrained. *Compare*  
3 *Jones v. Cunningham*, 371 U.S. 236 (1963) (finding that conditions imposed  
4 on a parolee were sufficient to constitute "in custody"), *with Henry v.*  
5 *Lungren*, 164 F.3d 1240, 1241-42 (9th Cir. 1999) (holding that an  
6 individual, who is required to register as a sex offender, is not "in  
7 custody"); *see also Dremann v. Francis*, 828 F.2d 6, 7 (9th Cir. 1987)  
8 (recognizing that a fine typically does not meet the "in custody"  
9 requirement). Under these circumstances, the Court finds Mr. Johnson was  
10 never "in custody" and, therefore, the favorable-termination rule does  
11 not apply. *See also Haddad v. California*, 64 F. Supp. 2d 930 (C.D. Cal.  
12 1999) (holding that *Heck's* favorable-termination rule did not apply  
13 because Haddad was not in custody as a result of his traffic conviction).

14 Because the favorable-termination rule does not apply and Mr.  
15 Johnson has standing to bring his § 1983 claim, the State's motion to  
16 dismiss Mr. Johnson's § 1983 claim is **denied**.

### 17 **C. The Tribe**

18 The State also seeks dismissal of the Tribe's § 1983 claim, which  
19 seeks the same injunctive relief as Mr. Johnson but applicable to all  
20 tribal members. The State relies on *Skokomish* and *Inyo County v. Paiute-*  
21 *Shoshone Indians*, 538 U.S. 701 (2003), to argue that the Tribe is not a  
22 "person" under § 1983 because it is vindicating a communal right held by  
23 the sovereign. In response, the Tribe acknowledges that it is not a  
24 "person" under the circumstances but maintains that it may pursue a  
25 § 1983 action as *parens patriae*. As explained below, the Court agrees  
26 with the State that the Tribe may not pursue this claim.

1 In *Inyo County*, the Supreme Court determined that a tribe could not  
2 pursue a § 1983 action challenging the county's actions to obtain tribal  
3 casino employment records. 538 U.S. at 711. The Supreme Court ruled,  
4 "[q]ualification of a sovereign as a 'person' who may maintain a  
5 particular claim for relief depends not 'upon a bare analysis' of the  
6 word 'person,' but on the 'legislative environment' in which the word  
7 appears." *Id.* Because the tribe was advancing its *sovereign* right to  
8 withhold evidence relevant to a criminal investigation, the Supreme Court  
9 determined, under the circumstances before it, that the tribe was not a  
10 person as defined by § 1983. *Id.* at 712.

11 Thereafter, the Ninth Circuit in *Skokomish* determined the tribe  
12 could not bring a § 1983 action to advance communal fishing rights  
13 because the tribe's ability to enter into the treaty with the federal  
14 government was a sovereign right. In reaching this conclusion, the Ninth  
15 Circuit "[r]ecogniz[ed] that '[s]ection 1983 was designed to secure  
16 private rights against government encroachment,' as well as the  
17 'longstanding interpretive presumption that "person" does not include the  
18 sovereign.'" 410 F.3d at 514-15. *Cf. Lac Courte Oreilles Band of Lake*  
19 *Superior Chippewa Indians v. Wisconsin* ("Lac Courte Oreilles"), 663 F.  
20 Supp. 682, 291 (W.D. Wis. 1987) (holding that the tribe was a "person"  
21 within the meaning of § 1983 when seeking vindication for the deprivation  
22 of a treaty-based usufructuary right<sup>12</sup>).

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24 <sup>12</sup> A usufructuary right is "the right to make a modest living by  
25 hunting and gathering off the land." *United States v. Bresette*, 761 F.  
26 Supp. 658, 660 (D. Minn. 1991).

1 Under the circumstances of this case, the Tribe properly concedes  
2 that it is not a "person" under § 1983 as defined by the Ninth Circuit.  
3 The Court also concludes that the Tribe may not bring a § 1983 claim as  
4 *parens patriae* as requested by the Plaintiffs. "*Parens patriae* is a  
5 doctrine whereby a sovereign . . . may in appropriate circumstances sue  
6 as 'parent of the country' to vindicate interests of their citizens.  
7 However, the entity purporting to advance the claim must be acting on  
8 behalf of the collective interests of all its citizens." *Navajo Nation*  
9 *v. Super. Ct. of the State of Wash. for Yakima County*, 47 F. Supp. 2d  
10 1233, 1240 (E.D. Wash. 1999). See *Alaska v. Native Vill. of Curyung*, 151  
11 P.3d 388 (Alaska 2006) (allowing village to bring § 1983 action as *parens*  
12 *patriae* to prevent future violations of the Adoption Act and the Indian  
13 Child Welfare Act). The Tribe is precluded from pursuing its *parens*  
14 *patriae* claim because the Ninth Circuit in *Skokomish* ruled that  
15 individual tribal members do not hold an interest in communal tribal  
16 usufructuary rights. There is no evidence in the record that the State  
17 has cited tribal members other than Mr. Johnson for hunting offenses when  
18 exercising their "in common" hunting rights. Accordingly, tribal members  
19 have not had state action taken against them for which the Tribe may  
20 vindicate those interests as *parens patriae*.

#### 21 D. Conclusion

22 As explained above, the Tribe's § 1983 claim is dismissed, while Mr.  
23 Johnston's § 1983 claim survives. The State's motion to dismiss is  
24 **granted and denied in part.**

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26 //

1     **III. Cross Motions for Partial Summary Judgment Re: Legal Standards**

2           Through their respective motions, the parties and the amici tribes<sup>13</sup>  
3 seek guidance as to what legal standard applies to determine whether the  
4 State's hunting-safety laws apply to tribal members exercising "in  
5 common" hunting rights on the North Half. The Tribe<sup>14</sup> submits that state  
6 regulation of "in common" hunting rights should be permitted only if  
7 necessary for conservation purposes, but not for public health and safety  
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9           <sup>13</sup> The amici tribes are the Tulalip Tribe, Muckleshoot Tribe, Port  
10 Gamble S'Klallam and Jamestown S'Klallam Tribes, Puyallup Tribe of  
11 Indians, Sauk-Suiattle Indian Tribe, Lower Elwha Klallam Tribe, Lummi  
12 Nation, Nisqually Indian Tribe, Swinomish Indian Tribal Community,  
13 Squaxin Island Tribe, Skokomish Indian Tribe, Stillaguamish Tribe of  
14 Indians, and Suquamish Indian Tribe. The applicable treaties are the  
15 Treaty with the Quinault (Treaty of Olympia), July 1, 1855, 12 Stat. 971;  
16 Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927; Treaty of Medicine  
17 Creek, Dec. 26, 1854, 10 Stat. 1132; Treaty with the Makah (Treaty of  
18 Neah Bay), Jan. 31, 1855, 12 Stat. 939; and Treaty of Point No Point,  
19 Jan. 26, 1855, 12 Stat. 933. The amici tribes encourage the Court to  
20 adopt the Colville Tribe's position because 1) the State fails to  
21 recognize the unique federal, state, and tribal statuses and the  
22 relationships between these entities, and 2) the State's proposed  
23 "incidental effects" standard would impose a new requirement.  
24

25           <sup>14</sup> The Court refers to Plaintiffs and amici tribes collectively as  
26 "the Tribe" for purposes of the summary judgment motions.

1 purposes.<sup>15</sup> If the Court allows the State to enforce public safety laws  
 2 against tribal members exercising their "in common" hunting rights, the  
 3 Tribe proposes that the State must show:

- 4 1) the law does not discriminate against the Indian tribe;
- 5 2) the law is required to prevent a demonstrable and imminent  
 6 threat to public health or safety;
- 7 3) the measure is appropriate to its purpose;
- 8 4) existing tribal regulation or enforcement is inadequate to  
 9 prevent the demonstrable and imminent threat to public health  
 10 or safety; and
- 11 5) adequate protection of public health and safety cannot be  
 12 achieved to the full extent necessary by restricting hunting  
 13 by nonmembers or by other less restrictive alternative means  
 14 or methods.

15 The State counters that its laws that directly regulate the time,  
 16 place, and manner of hunting must satisfy only the first three factors.  
 17 And the State maintains that it need not establish any of these factors  
 18 if its law 1) does not directly regulate the time, place, and manner of  
 19 hunting, and 2) has no more than an incidental effect on the hunting  
 20 right.

21 Over the past century, the Supreme Court and the Ninth Circuit have,  
 22 on multiple occasions, elucidated the principles guiding analysis of  
 23 sovereignty issues relating to treaty-reserved usufructory rights "in  
 24 common with the citizens of the state" in Washington.<sup>16</sup> See *United*

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25 <sup>15</sup> For simplicity purposes, the Court hereafter refers to "public  
 26 health and safety" as simply "public safety."

<sup>16</sup> History is critical to fully understanding Indian law principles:

Understanding history is crucial to understanding doctrinal  
 developments in the field of Indian law. For example,



1 *States v. Winans*, 198 U.S. 371, 378 (1905) (holding that state license  
2 did not give Washington settler the right to exclude the Indian seeking  
3 to enjoy his "in common" fishing right); *Tulee v. Washington*, 315 U.S.  
4 681, 684-85 (1942) (reversing tribal member's state conviction for  
5 catching a salmon without a state license because state statute was not  
6 "indispensable to the effectiveness of a state conservation program");  
7 *Puyallup Tribe of Dep't of Game ("Puyallup I")*, 391 U.S. 392, 399 (1968)  
8 (allowing state "nondiscriminatory measures for conserving fish  
9 resources" subject to "in common" fishing right); *Dep't of Game v.*  
10 *Puyallup Tribe ("Puyallup II")*, 414 U.S. 44, 46-49 (1973) (invalidating  
11 state's net-fishing ban because it discriminated against Indians);  
12 *Antoine v. Washington*, 420 U.S. 194, 207 (1975) (defining "appropriate  
13 standards" in the context of state-conservation measures); *Washington v.*  
14 *Wash. Commercial Passenger Fishing Vessel Ass'n ("Fishing Vessel")*, 443

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16 treaty-making with Indian tribes involved matters of immense  
17 scope: The transactions totaled more than two billion acres,  
18 and some individual treaties dealt with land concessions  
19 involving tens of millions of acres. At the same time, treaties  
20 included minutiae such as provision of scissors, sugar,  
21 needles, and hoes. Yet, out of the felt needs of the parties  
22 to the treaty negotiations there evolved comprehensive  
23 principles that have continued significance to this day. These  
24 include the sanctity of Indian title, the necessary preeminence  
25 of federal policy and action, the exclusion of state  
26 jurisdiction, the sovereign status of tribes, and the special  
trust relationship between Indian tribes and the United States.  
These principles endure beyond the four corners of negotiated  
treaties. When Congress ended treaty-making in 1871, these  
principles lived on in the "treaty substitutes" that followed  
in the form of agreements, executive orders, and statutes.  
Thus, what is seemingly background becomes the foreground—  
indeed the basis—for contemporary judgments.

1-1 Cohen's Handbook of Federal Indian Law § 1.01.

1 U.S. 658, 682-83 (1979) (analyzing the district court's take allocation  
2 of particular fish between the state and the tribe); *United States v.*  
3 *Washington*, 520 F.2d 676, 685 (9th Cir. 1975) (analogizing "in common"  
4 treaty rights to a cotenancy).

5 Notably absent from the binding Supreme Court and Ninth Circuit  
6 cases dealing with state regulation of "in common" usufructuary rights  
7 is any reference to a state's exercise of its public-safety police power.  
8 While the parties cite to and rely upon non-binding district court and  
9 state appellate court decisions addressing the state public-safety issue,  
10 these cases are not binding precedent; further, they use slightly  
11 different terminology and address different issues. *See Wisconsin v.*  
12 *Matthews*, 248 Wis. 2d 78 (Ct. App. 2001); *Mille Lacs Band of Chippewa*  
13 *Indians v. Minnesota*, 861 F. Supp. 784, 838-39 (D. Min. 1994); *Lac Courte*  
14 *Orielles*, 668 F. Supp. at 1235; *Wisconsin v. Whitebird*, 110 Wis. 2d 250  
15 (Ct. App. 1982); *Wisconsin v. Gurnoe*, 53 Wis. 2d 390 (Sup. Ct. 1972).  
16 Therefore, the Court elects to focus on the principles announced in the  
17 binding precedents when developing the standards to apply to the State's  
18 hunting safety laws as applied to a tribal member exercising "in common"  
19 hunting rights.

20 Before articulating these standards, the Court digresses to explain  
21 why a state has the authority to regulate "in common" hunting rights  
22 under appropriate standards for public-safety purposes. The Supreme  
23 Court and Ninth Circuit have emphasized that neither treaty nor non-  
24 treaty individuals may destroy the exercise of the "in common" rights of  
25 the other individuals.<sup>17</sup> *Fishing Vessel*, 443 U.S. at 669; see also

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26 <sup>17</sup> The same principles that underlie the protection of "in common"

1 *Kennedy v. Becker*, 241 U.S. 556, 563 (1916) (recognizing that neither the  
2 tribe nor the state may "destroy the subject," i.e., the fish over which  
3 they both enjoy the power to govern); *United States v. Washington*, 520  
4 F.2d 676, 685 (9th Cir. 1975) ("[N]either the treaty Indians nor the  
5 state on behalf of its citizens may permit the subject matter of these  
6 treaties to be destroyed. The state may interfere with the Indians'  
7 right to fish when necessary to prevent the destruction of a run of a  
8 particular species in a particular stream."). Although the Supreme Court  
9 and Ninth Circuit have focused on the *subject* of the "in common" treaty-  
10 fishing right at issue, i.e., the fish, the Court finds that this "non-  
11 destruction" principle extends to the *individual exercising* the "in  
12 common" right, i.e., the hunter or fisher. This conclusion is supported  
13 by the Tribe's understanding when it entered the 1891 Agreement that  
14 neither tribal members nor state citizens could destroy each other's  
15 right to exercise the "in common" hunting right. See E. Goodman,  
16 *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights:*  
17 *Tribal Comanagement as a Reserved Right*, 30 *Envtl. L.* 279, 309 & 320-24  
18 (Spring 2000) (recognizing that tribes and states understood that they  
19 shared the right to manage the exercise of "in common" hunting and  
20 fishing rights). Further, at that time, the Tribe would have recognized  
21 the State's a) indisputably strong interest in protecting its citizens  
22 through enforcement of safety laws, see *Kelley v. Johnson*, 425 U.S. 238,  
23 247 (1976), and b) power to regulate conduct to ensure that every person  
24  
25 \_\_\_\_\_  
26 fishing rights apply to "in common" hunting rights. *Antoine*, 391 U.S.  
at 207 (adding "and hunting" to *Puyallup I* quote).

1 uses "his property as not to injure his neighbors" and that "private  
2 interests" are "subservient to the general interests of the community,"  
3 *Slaughter-House Cases v. Crescent City of Live-Stock Landing & Slaughter-*  
4 *House Co.*, 83 U.S. 36, 62 (1872). Accordingly, it is clear the Tribe  
5 understood that the State has the police power to regulate "in common"  
6 hunting conduct by tribal members for public-safety purposes.

7 The Court now articulates the standards to be applied. Using the  
8 Supreme Court's conservation-necessity standard as its guide,<sup>18</sup> the Court  
9 holds that a state may enact and enforce laws regulating a tribal  
10 member's exercise of an "in common" hunting right for public-safety  
11 purposes if the law('s):

- 12 1) reasonably prevents a public-safety threat;<sup>19</sup>
- 13 2) is necessary to prevent the identified public-safety threat;<sup>20</sup>
- 14 3) does not discriminate against Indians;<sup>21</sup> and

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15  
16 <sup>18</sup> A state may enact and apply conservation laws to tribal members  
17 enjoying "in common" hunting and fishing rights if it is non-  
18 discriminatory, "is a reasonable and necessary conservation measure, and  
19 . . . its application to the Indians is necessary in the interest of  
20 conservation." *Antoine*, 420 U.S. at 207 (internal citations omitted).

21 <sup>19</sup> See *Antoine*, 420 U.S. at 207.

22 <sup>20</sup> See *id.*; *Tulee*, 315 U.S. at 684 (emphasizing that state-license  
23 requirement was not necessary because it was "not indispensable to the  
24 effectiveness of a state conservation program").

25 <sup>21</sup> See *Antoine*, 420 U.S. at 207; *Puyallup II*, 414 U.S. at 46-47  
26 (invalidating discriminatory state fishing ban); *Puyallup I*, 391 U.S. at

1           4) application to the Tribe is necessary in the interest of public  
2           safety.<sup>22</sup>

3           The Court does not adopt either the Tribe's proposed a) "ineffective  
4           tribal self-regulation" factor or b) least-restrictive-alternative  
5           factor.<sup>23</sup> As to the former, *Antoine's* determination of "appropriate  
6           standards" did not include, either explicitly or inferentially, effective  
7           tribal self-regulation. Nor did the Ninth Circuit do so in *United States*  
8           *v. Washington*, 520 F.2d at 686 n.4. Although the Ninth Circuit did not  
9           remove the state-regulation stay imposed by U.S. District Court Judge  
10          George Boldt described as advancing "the Congressional policy of  
11          promoting tribal autonomy," that does not amount to adoption by the Ninth  
12          Circuit of "ineffective tribal self-regulation" as a factor for  
13          appropriate state regulation. *Id.* (discussing *United States v.*  
14          *Washington*, 384 F. Supp. 312, 333 & 340-42 (W.D. Wash. 1974)). Further,  
15          in 1891, the Tribe understood that it and the State co-managed "in  
16          common" wildlife and the individuals hunting the wildlife. The non-  
17          adoption of an ineffective-tribal-self-regulation factor does not

18 \_\_\_\_\_  
19          399 ("The overriding police power of the State, expressed in  
20          *nondiscriminatory* measures for conserving fish resources, is preserved."  
21          (emphasis added)).

22                 <sup>22</sup> See *Antoine*, 420 U.S. at 207.

23                 <sup>23</sup> Nonetheless, the Court will compare state and tribal hunting-  
24          safety laws when assessing whether 1) the state law is necessary to  
25          prevent the identified public-safety threat and 2) the law's application  
26          to the Tribe is necessary in the interest of public safety.

1 negatively impact tribal self governance and ensures that the 1891  
2 Agreement is interpreted as understood at the time of the agreement.

3 As to the latter factor (least-restrictive-alternative factor),  
4 there is no Supreme Court or Ninth Circuit precedent adopting such a  
5 factor when analyzing the appropriateness of state regulation of "in  
6 common" treaty rights.<sup>24</sup> Because there is no binding precedent to support  
7 the use of a least-restrictive-alternative factor, the Court elects not  
8 to adopt it.

9 The four public-safety standards set forth above apply regardless  
10 of whether the state law 1) does not directly regulate the time, place,  
11 and manner of hunting and 2) has no more than an incidental effect on the  
12 hunting right. The State proposed that, if the preceding two prongs were  
13 satisfied, the state law applied to an Indian exercising "in common"  
14 hunting rights notwithstanding the failure to satisfy appropriate non-

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15  
16 <sup>24</sup> While the Sixth Circuit did adopt such a factor, it offered no  
17 rationale for doing so. *United States v. Michigan*, 653 F.2d 277, 279  
18 (6th Cir. 1981) (citing *Michigan v. LeBlanc*, 399 Mich. 31, 62 (Sup. Ct.  
19 1976), for the least-restrictive-alternative factor; however, *LeBlanc* did  
20 not articulate a least-restrictive-alternative factor but rather utilized  
21 two "necessary" factors); see also *Lac Courte Oreilles*, 668 F. Supp. at  
22 1236 (adopting a least-restrictive-alternative factor because the "state  
23 does not appear to contest this standard, and the least restrictive  
24 alternative does not appear incompatible with the reasonable and  
25 necessary test"). As such, the Sixth Circuit's decision is neither  
26 informative nor persuasive.

1 discriminatory public-safety standards. The Court disagrees because the  
2 legal authority relied upon by the State is either inapplicable or  
3 contravenes U.S. Supreme Court treaty-interpretation principles.

4 The State relies on *United States v. Gallaher*, 275 F.3d 784 (9th  
5 Cir. 2001); *United States v. Fox*, 573 F.3d 1050 (10th Cir. 2009); and  
6 *Washington v. Olney*, 117 Wn. App. 524 (2003). The Court finds *Gallaher*  
7 and *Fox* inapplicable because both cases involved *federal* prosecutions  
8 against tribal members relating to being a felon in possession of a  
9 firearm or ammunition. The standard applied to assess whether a *federal*  
10 statute *abrogates* a treaty right is fundamentally different than the  
11 standard applied to assess whether a *state* may regulate an Indian's  
12 exercise of an "in common" treaty usufructuary right. See *Menominee*  
13 *Tribe of Indians v. United States*, 391 U.S. 404, 411 n.12 (1968)  
14 (recognizing that a treaty is a "supreme law of the land" and therefore  
15 generally not subject to state regulation absent Congressional  
16 cessation); *Solis v. Matheson*, 563 F.3d 435, 437 (9th Cir. 2009) (setting  
17 forth general-applicability doctrine as it relates to a federal statute);  
18 *Oregon v. Jim*, 81 Or. App. 189, 191 (1986) (distinguishing between the  
19 federal government's authority to regulate Indian conduct with a state's  
20 more limited ability); L. Martin, K. Simmons, and E. Surette, 42 C.J.S.  
21 Indians: State Regulation: Off-Reservation Activity § 139 (2010)  
22 (recognizing that an Indian tribal member is subject to generally-  
23 applicable state laws regulating wildlife *unless* "in common" wildlife  
24 rights have been expressly reserved by the tribe).

25 Because *Olney* failed to appreciate the distinction between *federal*  
26 and *state* governments and their relationships with an Indian treaty,

1 Olney incorrectly relied on *Gallagher*. 117 Wn. App. at 530-31.  
2 Therefore, *Onley*'s conclusion that the defendants failed to identify a  
3 "specific treaty right exempting them from [state] laws of general  
4 applicability off reservation boundaries" contravenes U.S. Supreme Court  
5 treaty-interpretation principles. *Id.* at 531. For these reasons, the  
6 Court declines to adopt the State's argument that appropriate, non-  
7 discriminatory public-safety standards need not be used to assess the  
8 lawfulness of all State hunting laws when applied to an Indian exercising  
9 an "in common" hunting right.

#### 10 IV. Conclusion

11 After careful consideration of binding Supreme Court and Ninth  
12 Circuit decisions, the Court determines 1) Mr. Johnson may pursue his §  
13 1983 claim, 2) the Tribe may not pursue its § 1983 claim, and 3) the  
14 State may regulate "in common" hunting conduct of tribal members by  
15 enactment and enforcement of laws that satisfy the public-safety  
16 standards adopted herein by this Court. Accordingly, for the reasons  
17 given above, **IT IS HEREBY ORDERED:**

18 1. Defendants' Motion to Dismiss Plaintiffs' § 1983 Claims (**ECF**  
19 **No. 26**) is **GRANTED** (the Tribe) **and DENIED** (Mr. Johnson) **IN PART**.

20 2. Plaintiffs' Motion for Partial Summary Judgment Re Legal  
21 Standard (**ECF No. 16**) is **GRANTED AND DENIED IN PART**.

22 3. Defendants' Motion for Partial Summary Judgment Re: Legal  
23 Standard (**ECF No. 29**) is **GRANTED AND DENIED IN PART**.

24 4. In order to regulate a tribal member's exercise of his "in  
25 common" hunting rights for public-safety purposes, the State must  
26 establish that its law('s):



- a. reasonably prevents a public-safety threat;
- b. is necessary to prevent the identified public-safety threat;
- c. does not discriminate against Indians; and
- d. application to the Tribe is necessary in the interest of public safety.

**IT IS SO ORDERED.** The District Court Executive is directed to enter this Order and forward a copy to counsel.

**DATED** this 3<sup>rd</sup> day of January 2011.

\_\_\_\_\_  
S/ Edward F. Shea  
EDWARD F. SHEA  
United States District Judge

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